IN THE

Supreme Court of the United States

October Term, 1946

No. 1206

FRANCIS S. CLAMITZ,

Petitioner,

against

THATCHER MANUFACTURING COMPANY, a corporation, and WALKERMAN D. DUGAN, JERVIS LANGDON, WILLIAM H. MANDEVILLE, RAY W. NIVER, FRANKLIN B. POLLOCK, FREDERICK W. SWAN and S. G. H. TURNER,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK. WO 2-3242

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Statement

The petitioner, the holder of 75 shares of the common stock of the respondent Thatcher Manufacturing Company brought this derivative suit in the District Court of the United States for the Southern District of New York, complaining of two steps taken by the directors of the corporation in conjunction with a new administration of the corporation's affairs, one granting options for the purchase of the corporation's stock to some eighteen officers, directors and employees, and the other with respect to a loan of $2,000,000 for the expansion and improvement of the corporation's plant and equipment (R. 2-14).*

* References to pages of the transcript of record are indicated by the letter "R".

At the trial the petitioner stipulated to withdraw his objections to all of the options, except five, and of these five only two were to directors, neither of whom had voted for the options (R. 99-100).

At the conclusion of the trial, the Court (Judge Vincent L. Leibell) rendered an oral opinion dismissing the complaint as to both matters (R. 82-94), and subsequently signed Findings of Fact and Conclusions of Law (R. 95-104), holding as to both matters that the acts of the directors were within their powers in the lawful and legitimate furtherance of the purposes of the corporation, were free from fraud and done in good faith and in the exercise of honest judgment and did not result in any waste of the assets of the corporation.

The petitioner thereupon appealed to the Circuit Court of Appeals for the Second Circuit, bringing up for review merely the granting of the options to the five officers and directors. That court affirmed (158 Fed. 2d, 687) with the comment that there was involved a business problem for the directors to solve, and added (p. 693):

> "Having justifiably found that they did it in the manner heretofore stated by honestly exercising their best judgment to promote the welfare of the corporation the trial court rightly dismissed the plaintiff's complaint whose charges of fraud and waste remained to the end the unproved assertions of but one dissatisfied stockholder".

We respectfully submit that the petition for a writ of certiorari should be denied because

(1) No questions of law are presented which justify the supervision and decision of this Court;

(2) There are no conflicts between circuits, as the petitioner here asserts; and

(3) The questions sought to be presented are without merit.

The Facts

The respondent Thatcher Manufacturing Company (hereinafter called "Thatcher") is a New York corporation, is engaged in the manufacture and sale of glass bottles and containers, with factories in Elmira and Olean, in the State of New York, and in Streator, Illinois, and in 1943 and 1944 also had factories in Long Island City and Lockport, New York (R. 95-96).

In 1943, when the option program was initiated, Thatcher's affairs were in an unsatisfactory condition and this was reflected in the stock market quotations of its common shares (R. 159). The price of the common stock had dropped from a high of 48⅞ and a low of 33⅞ in 1936, to a high of 9¼ and a low of 5 in 1942. In 1943 a low of 6¼ was reached. At the same time, in contrast to fairly substantial dividends on the common for the six years 1935-1940, no dividends at all had been paid in 1941, 1942 and 1943 (R. 159).

One Franklin B. Pollock was at the time Thatcher's New York Sales Manager under a five-year contract commencing January 1, 1942, under which he received in salary and commissions in 1942 $52,000, in 1943 $75,740 (R. 36, 96), and, had his contract been continued, his compensation in 1944 would have aggregated $88,758.20, and in 1945 $96,358.67 (R. 190).

Pollock had been with Thatcher's subsidiary, Olean Glass Company, from its inception in 1928 in various capacities, finally becoming Vice-President (R. 49). As the trial court pointed out, Pollock was not a newcomer to the situation and was the biggest money earner in the corporation (R. 85).

It was during this period of the corporation's failing fortunes that Pollock and some friends and relations

began in 1943 to acquire stock of Thatcher, Pollock himself buying 7,668 shares, and the total acquisitions of himself and these associates aggregating 35,000 shares (R. 50). (None of these associates acquired positions with the corporation nor did they become officers or directors (R. 68-69)).

Finally, on December 15, 1943 Pollock presented to the directors of the corporation a comprehensive program for its rehabilitation (R. 171-174), which involved changes in personnel (including his own election as President), the effecting of economies in the corporation's plants, the reorganization of its sales department, changes with respect to sales policies, a management bonus plan and a stock option plan for key executives.

In view of the petitioner's gratuitous statement that the Board of Directors "immediately surrendered the control of the corporation to Pollock" (Br. p. 8), we wish to emphasize the character of the personnel of the board.* It then consisted of eight directors, four elected by the preference stock (whose tenure of office could not be disturbed by any common stockholder such as Pollock) and four by the common stock.

Of these eight directors, one was President of an Elmira bank, one was Chairman of the board of another Elmira bank, one was President of an Elmira coal company, one was a member of a New York investment banking house, one was a retired President of Thatcher, one was General Counsel for Thatcher, one was the then President of Thatcher and one was the then Vice-President of Thatcher. With the exception of the then President of Thatcher, all of the directors were stockholders, six of

* The full detail with respect to the personnel of the directors will be found in tabulated form on p. 139 of the Record.

them holding substantial blocks. Moreover of these eight, two had been directors since 1913, one since 1916, one since 1922, one since 1927, one since 1936 and one since 1940.

That such a board would "surrender" the control of the corporation to Pollock is against reason or common sense. On the contrary it would be motivated to improve the corporation's situation.

This Board of Directors acted favorably upon Pollock's recommendations and at a subsequent meeting on December 22, 1943 authorized the option program in question.

As to Pollock the directors approved a new arrangement under which he would surrender his favorable employment contract and receive a salary of $50,000 a year for five years and options for common stock of 5,000 shares at $10.00 per share to be exercised on or before February 1, 1944, and 5,000 shares at $15.00 per share and 5,000 shares at $20.00 per share to be exercised on or before January 1, 1949. Like options were authorized in lesser amounts to four other key officials, *i.e.*, F. K. Rodewald, W. D. Dugan, George Dusterdieck and Whitney S. Powers (R. 176-178).

The situation with respect to these other four optionees was as follows (R. 65-68):

Rodewald had at one time been connected with Thatcher, but in 1943 was associated with Georgeson & Company at a salary of $12,000 a year, plus a percentage of the profits, and to induce him to return to Thatcher Pollock had suggested a salary of $18,000 a year and the options.

Dugan had been President of Olean Glass Company and later Vice-President of Thatcher and a director, and therefore had been Pollock's superior, whereas under Pollock's program, Pollock would become Dugan's

superior. Pollock persuaded him to stay with the corporation, not increasing his salary, but proposing the option arrangement as an inducement.

Dusterdieck had been Sales Manager for a number of years, and as an inducement to him to remain he was offered the Vice-Presidency in charge of sales and the options.

Powers had been Assistant Production Manager, but had indicated his purpose to leave the corporation. He was persuaded to stay and become its Secretary and Treasurer with an increase in salary and the options.

Put briefly, the situation was that the services of these four key officials were either obtained or retained by the new administration upon the inducement, among other things, of giving them the options in question.

In addition, it was contemplated that options would be granted to others than the five already mentioned, Pollock's entire program contemplating options on an aggregate of 39,260 shares (R. 180), and that there was an opportunity for everybody to participate in the fruits of their own work and efforts was generally made known throughout the corporation (R. 65). (Subsequently options were granted to thirteen other optionees, but, as has been stated, the petitioner stipulated upon the trial to withdraw his objections as to these thirteen additional optionees (R. 99-100)).

The basis of the determination of the minimum option price of $10.00 per share was logical and simple. The board fixed that minimum because it represented the average value of the stock as traded in on the New York Stock Exchange for the year 1943. The board discounted a rise in the price of the stock during the last quarter of 1943 because of the circumstance that the purchases by

Pollock and his associates in the very small market which existed had caused the quotations to rise about four points (R. 36-37).

There has never been any contention by the petitioner that the minimum of $10.00 per share was not an appropriate figure when decided upon in December of 1943. It has been the petitioner's contention that that figure should not have been retained when the options were formally granted in March of 1944, at which time the market price of the stock had risen to $19.00.

This brings us to what is really the gist of the case. What happened was that after the directors had decided to grant the options in question to the five designated optionees and such others as should be determined upon, and the new administration had come into office upon that basis, it developed that there was not enough available common stock to permit of carrying out the program. Consequently, the matter of options again came up at the next meeting of the directors on January 19, 1944 (R. 55) at which time it was determined to postpone the carrying out of the program in order to submit to the stockholders a proposal for the reclassification of the stock of the corporation to make available for the option program an additional 36,000 shares of common stock.

Had it not been for this technical difficulty, the options could have been granted immediately, and the directors felt that the program had to be proceeded with because, as stated by the respondent Mandeville (one of the directors and general counsel for the corporation), there was a definite commitment to these officers and employees "which except for the mechanical procedure of producing stock with which to fill the options would have been carried out immediately" (R. 75).

The trial court properly found that the carrying out of the option program was appropriate and necessary as a matter of recognizing the moral obligations incurred to the said several optionees in December, 1943 and therefore to preserve the morale of the corporation's organization (R. 100), and the Circuit Court of Appeals said (158 Fed. 2d 687, 693):

> "Whether to disappoint the just expectations of those on whom the corporation needed to rely during its upbuilding was a business problem for the directors to solve."

The matter of reclassifying the corporation's stock was thereupon proceeded with and the matter was submitted to the stockholders at their annual meeting held March 2, 1944. The notice of meeting and the proxy statement (R. 137-143) contain precise statements of the reclassification which was desired and of the purpose for which it was sought, including the proposal for options to Pollock and others, together with the prices and termination dates as to each price level, and there was likewise transmitted to the stockholders a proxy which permitted each stockholder to indicate whether he wished to vote for or against the proposed reclassification (R. 195-196).

At this meeting on March 2, 1944, the reclassification of stock was approved, 91,893 shares of preference and 106,648 shares of common stock voting in favor of the proposal and 3,998 shares of preference and 11,952 shares of common stock voting against the proposal (R. 149-152). In pursuance of this approval, the Certificate of Reclassification was thereupon filed on March 6, 1944 (R. 185).

The petitioner had been represented at the stockholders' meeting by counsel and had unsuccessfully sought an adjournment of the meeting. His counsel thereafter

wrote Thatcher a letter (R. 23-24) in which, however, he merely complained about the $10.00 option proposed to be given to Pollock and demanded that the corporation and its officers "take proper action to prevent the scheme to sell the stock to the president of the corporation at less than the real value."*

Thereafter, at a meeting of the Board of Directors on March 22, 1944, the options were formally approved, Pollock and Dugan (the only two director-optionees) not voting (R. 185-187).

At this time the market price of the common stock had risen to $19.00 per share (R. 100) but, as has been pointed out, the directors did not feel that they could repudiate the basis on which the new administration had been set up and refuse to grant the options at the prices fixed in December, 1943 when the option program had been presented as an inducement to the new administration.

As has been stated, both the trial court and the Circuit Court of Appeals found that the directors acted in good faith and for the best interests of the corporation and there certainly was substantial evidence to support these determinations.

However, the petitioner makes the contention that Pollock exercised his $10.00 option (which is not the fact) and at the same time in March, 1944 sold 2,468 shares at about $19.00 per share for a total of $44,913.50 (Br. pp. 12-13). The petitioner contends that on May 15, 1944 the board adopted a resolution releasing Pollock from his "liability" to the corporation for the difference between $19.00 per share which he received on the 2,468 shares, and the $10.00

* Nothing was said in the letter about the options at higher levels to Pollock or about the options to others and as it ultimately eventuated that Pollock took down no stock at $10.00, the present contentions were manifestly afterthoughts.

option price "which he had exercised at the same time under his option contracts", such asserted liability being in pursuance of Section 16 (b) of the Securities Exchange Act of 1934.

It is not disputed that Pollock had sold 2,468 of his shares which he acquired in the previous year. This was not a market speculation. It appeared without contradiction, and was so found by the trial court, that after Pollock became President in December, 1943 it was necessary for him to move to Elmira, New York (the home office of the corporation) for which reason he bought a house there for which he paid $21,000 and, at the same time, paid off a bank loan of $25,000 and income taxes of approximately $9,000, or a total of $55,000 (R. 42-43).

The trial court's finding was that Pollock had sold 2,468 shares of his stock for a total of $44,913.50 in order to satisfy personal obligations in excess of that amount (Finding 20, R. 100), and no error was assigned to this Finding (R. 107-108).

However, Pollock at no time had exercised his $10.00 option, but had permitted it to lapse. In consequence, the directors on May 15, 1944, after the option had lapsed, substituted a new option for 5,000 shares at $15.00 per share to be exercised on or before April 1, 1945 (R. 152-154). At the time this new option was granted, the stock had declined to 16¾ (R. 57). (Finding 20, R. 100.) Moreover, Pollock exercised this new option only as to 3,000 shares, doing so on March 31, 1945 when the market price was 14¾ (R. 47).

Whether or not Pollock originally intended to exercise the $10.00 option is beside the point. He never did so and there is therefore no substance whatever to petitioner's contention in that respect.

Petitioner also makes the contention (Br. p. 27) that the options were not conditioned upon employment and that each optionee could have exercised all of his options on one day and terminated his employment the next (Br. p. 27). This is not the fact in the case of Pollock who had a new contract for a fixed term (R. 145-148). As to the others, such contracts were not entered into as the setup obviously was experimental. However, all of the optionees are still with the corporation, except three of the thirteen eliminated by the petitioner (of those three, two were let out and one was pensioned after 37 years of employment with the corporation), and with the exception of Dugan, who was still with the corporation a year later and who exercised his option only for the $10.00 stock, and Dugan did not voluntarily leave, but his resignation was requested (R. 64).

On the subject of waste, the trial court made the following finding (Finding 26, R. 101):

> "There was no waste of the corporation's assets on the part of the Board of Directors in the granting of the said several options".

No error has been assigned as to this finding.

It is apparent that Pollock's proposal for a new management made to the directors in December, 1943 was fully justified by the aftermath as reflected in the appreciation of the market value of the stock, and that the incentive given the key executives of a participation in the ownership of the business proved to be, as the directors expected it would be, a material factor in the improvement which ensued.

Certainly there was substantial evidence upon which to predicate the determination of the trial court and no

question is presented to justify the consideration of this Court.

Argument

The petitioner assigns seven so-called reasons for the granting of the writ (Br. pp. 4-5) and we will discuss them in the order in which the petitioner sets them forth.

1. As to the petitioner's contention that this case presents important questions in corporation law involving fiduciary obligations of officers and directors.

As his first reason for the granting of the writ, the petitioner contends that this case presents important questions in corporation law involving fiduciary obligations of officers and directors, asserting that the opinion of the Circuit Court of Appeals in the case at bar is in conflict with the decision of the Sixth Circuit in the case of *Ashman* v. *Miller*, 101 Fed. 2d 85.

That case involved the question as to whether the purchase by corporate directors for their own benefit of voting trust certificates of the corporation was under such circumstances as to impose upon them the duty to act for the corporation.

No conflict can be found between the philosophy of that case (which does not quadrate upon the facts) and the philosophy of the instant case where the Circuit Court of Appeals said, at p. 692:

> "Of course the directors were fiduciaries who were bound to act at all times fairly and honestly for the best interest of the corporation and could not take advantage of their position as 'insiders' for their own personal gain. They had to see to it that the corporation should have the benefit of

their best judgment and act solely and always in good faith to promote its welfare."

In the instant case, the Circuit Court of Appeals went on to point out that incentive compensation must bear a reasonable relation to the value of the services it is made to obtain, and then said at p. 692:

> "Such reasonable relationship is in the first instance an affair of business to be handled in the light of all the relevant circumstances in the exercise of the unbiased judgment of those in charge of the business itself."

The court then cited *Pollitz* v. *Wabash R. R. Co.,* 207 N. Y. 113, where it had been said of directors (p. 124):

> "Their corporate acts, within the powers of the corporation, in the lawful and legitimate furtherance of its purposes, in good faith and the exercise of an honest judgment, are valid and conclude the corporation and the stockholders. Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient."

The directors, in formulating and proceeding with the option program were exercising the general discretion in them reposed; there was no fraud and in their opinion the options were for the best interests of the corporation.

Moreover, as we have said, the trial court's finding that there was *no waste* has not been assailed.

In this connection, we call to the Court's attention the careful consideration of the matter of options in *Diamond* v. *Davis,* 38 N. Y. S. 2d 103 (not officially reported; affirmed without opinion 265 App. Div. 919 and 292 N. Y. 552), which is peculiarly appropriate here. There it was said (p. 113):

> "Where the services are of value and are so recognized, in the absence of statutory provision or decision to the contrary, stockholders and directors acting in good faith may grant a bonus, or an option, to a valuable officer, by which a proprietary interest may be purchased by him or any employee so favored, at a price fixed in the agreement, as an incentive to retain his services, sharpen his interest, intensify his zeal, spur him on to more ardent effort in the interest and for the benefit of the company, and to enable him thereby to share in the resulting success of the enterprise."

This case manifestly presents no important question of corporation law which justifies the consideration of this Court.

2. As to the petitioner's contention that there is here directly involved the consideration of Rule 8(c) of the Federal Rules of Civil Procedure, requiring a defendant to plead specially matters in avoidance or justification, and as to certain miscellaneous contentions in the petitioner's brief.

The petitioner presents as a second basis for granting the writ that this case directly involves the consideration of Rule 8(c) of the Federal Rules of Civil Procedure,

which requires a defendant to plead affirmatively matters in avoidance or justification (Br. p. 4) and amplifies the contention at pages 15 and 16 of his brief.

This contention is here made for the first time in this litigation. It was not advanced to the trial court or to the Circuit Court of Appeals. Moreover, it is completely without merit.

It seems to be the petitioner's contention that the trial court first ruled that the granting of the options at $10 when the market price was $19 would normally constitute a constructive fraud upon the corporation, but then held that there was something else in the case to remove it from constructive fraud, i.e., that it had been found necessary to proceed with the option plan because of the understandings with the various officers and employees at the time the proposal originally was approved. The petitioner asserts that this justification of the affair was the sort of affirmative defense which should have been pleaded under Rule 8(c).

Not only did the petitioner not raise this point below, but the pleadings demonstrate that the Rule has no application to this case. Here the petitioner's complaint had charged that the granting of the options was contrary to equity and good conscience and operated as a fraud on the corporation and its stockholders who opposed it (R. 11), allegations which were denied in the answers (R. 28). Consequently, it was the petitioner who alleged fraud, which was denied by the respondents, and no affirmative defense whatever could be involved.

In this connection petitioner cites *Schmidtke* v. *Conesa*, 141 Fed. 2d 634, as holding contrary to the result here and therefore as creating a conflict of the circuits. That case has no application. It was a suit under the Fair Labor

Standards Act for unpaid overtime compensation. All that the court there held was that the plaintiff, in order to state a cause of action under the statute, was not required to allege that its exemptions were inapplicable to him, but that exemption was a matter which might be alleged as a special defense. That holding has no bearing upon a situation such as this, where the plaintiff charged fraud and the defendants' only duty was to negate the charge.

Petitioner further contends (Br. p. 17) that the evidence which was the foundation for this defense was inadmissible as it was based upon conversations between Pollock and the men whom he was engaging and was "clearly objectionable on the ground of the Hearsay Rule". At the trial the petitioner's counsel made the objection that at the time of his conversations with the then prospective executives Pollock was neither an officer nor a director of the corporation and that any conversations or dealings he had with them was not binding (R. 65-66). Nothing was there said expressly about the hearsay rule.

In any event, the rule is not applicable because the conversations were themselves the factum of the arrangements which were being made, and whether or not Pollock was then an officer or director became beside the point when his negotiations were acted upon and approved by the directors of the corporation.

Whether the testimony with respect to these arrangements was false, as the petitioner also asserts (Br. p. 18), is not here open for review, as the trial court's finding to the contrary was amply supported by the testimony which was not at any point contradicted.

As part of this same general discussion, the petitioner asserts that the reclassification of the stock for option purposes was procured by fraudulent means (Br. p. 19). Petitioner is talking particularly about the manner in which the matter was submitted to the stockholders. Yet the proxy statement (R. 137-143) fully advised that the effect of the adoption of the resolutions would be to make available 36,000 shares of common stock which it was contemplated the Board of Directors might from time to time and without further authorization of the stockholders issue and sell "to such officers and employees as determined by the directors", specifying the prices and the termination dates. The petitioner complains, however, that it was not disclosed who the optionees, other than Pollock, were to be, but it does not appear that the directors themselves knew until after March 2, 1944 who would comprise the full list of optionees. As to the option prices, the stockholders must be presumed to have known that on the day before the meeting the market price of the stock was 17-16½ (R. 65). The stockholders were fully apprised of all material features and, other than the petitioner, no stockholder ever has complained of the matter (R. 77).

The petitioner goes so far as to make the assertion (Br. p. 20) that in the proxy statement the stockholders were informed that no one owned more than 10% of the stock (R. 40), whereas it was concealed from the stockholders "that Pollock controlled over 20% of the stock". The statement contained in the proxy statement was precisely accurate and as called for by Regulation X-14 of the Securities and Exchange Commission under the Securities Exchange Act of 1934. Moreover, there is no evidence whatever that Pollock then "controlled over 20%

of the stock" much less that he ever owned more than 10% of it.*

Nor of course is it material that the proxy statement set forth the proposal that the optionees could borrow 80% of the option price from the corporation (Br. p. 20), since, as stated in the petitioner's brief, no such program was carried out.

All of these contentions would seem to be resolved by the finding of the trial court that there was no fraud on the part of the directors in the granting of the said several options (Finding 25, R. 101). That finding certainly was not clearly erroneous and is therefore not open to review by an appellate court (Rule 52 of the Federal Rules of Civil Procedure).

3. As to the petitioner's contention that the affirmance of the judgment of the trial court with respect to the "release" of Pollock from his "admitted liability" is in conflict with the Fifth Circuit.

The petitioner next contends (Br. p. 4) that the affirmance of the judgment of the trial court that the directors had the power and acted in good faith when they released the president and director from his "admitted liability" for the profit of $8 per share on 2,468 shares which he sold in March, 1944 is in conflict with a decision of the Fifth Circuit. (*Hurt* v. *Cotton States Fertilizer Co.*, 159 Fed. 2d 252.)

There is nothing in this point because, as we have said (*supra*, p. 10), Pollock never exercised his $10 option,

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* The proxy statement expressly called attention to the fact that in addition to his own holdings Pollock's immediate family beneficially owned 3,000 shares of common stock (R. 139, footnote 2).

and therefore was never under any obligation to the corporation under Section 16(b) of the Securities Exchange Act of 1934.

Moreover, the cited decision in the Fifth Circuit has nothing whatever to do with such a situation. That case was concerned with the propriety of the granting of retroactive compensation in the form of bonuses to themselves by directors, who were the holders of all of the common stock, as against the complaint of preferred stockholders.

4. As to the petitioner's contention that the decision, "to the effect that options to purchase stock may be granted to officers and directors without fixing the value of the stock and without restricting the right to transfer the stock conditioned on the term of employment", is in conflict with two decisions of the District Court in Pennsylvania.

This contention of the petitioner (Br. p. 4) is based upon a false assumption and upon a lack of understanding of the import of the two Pennsylvania decisions in question, i.e., *Holthusen* v. *Edward G. Budd Mfg. Co.*, 52 Fed. Supp. 125 and 53 Fed. Supp. 488.

The assertion that the options were granted without fixing the value of the stock is amplified by the petitioner at p. 26 of his brief, but is without substance. Mr. Mandeville, general counsel of the corporation, testified that the value was fixed by the board on December 22, 1943, and that it was based upon the average market value of the stock for the year 1943 (R. 36-37). This testimony was corroborated by that of Mr. Pollock (R. 55) and there was no contradiction.

The two *Holthusen decisions* are discussed by the petitioner at pp. 27-29 of his brief. In the first of these decisions the District Court disapproved of options where the optionees were not required to obligate themselves to remain in the corporation's employ. In the second decision the same judge approved of a later modified plan which provided for five year options, although the optionee was only required to remain in the corporation's employment for one year. The court in the second decision phrased the question as being "whether it appears that the value of the options does not bear a reasonable relation to the consideration to be received for them" (53 Fed. Supp. 488, 490).

In other words, it was the theory of the District Judge that the matter was one of a balancing of factors.

In the instant case, the Circuit Court of Appeals said (p. 693):

> "Some complaint has been made because the options could be exercised at any time after they were granted, though only while the optionees remained in the employ of the corporation, and that they were not conditioned upon any agreement by the optionees to remain employed for a definite period. Whether or not such a condition would have helped or hurt the incentive features of the arrangement and consequently been good or bad for the corporation was also a business problem for the directors to solve. Having acted honestly in that regard, the result of their best judgment is binding upon the corporation and its stockholders."

The petitioner's position is, to say the least, inconsistent, since upon the trial he withdrew his objection to thirteen of the eighteen options, none of which contained anything binding as to the term of employment.

Whether here the optionees were to be obligated to work for the corporation for any particular length of time, or for no length of time, was obviously in the discretion of the board of directors. It is to be borne in mind that the directors were dealing with a situation where a new administration was replacing the old administration, and where there were a number of changes in the top personnel. It was the desire of the directors in creating this new setup to give the key men options as incentives to produce the best possible results, but the setup necessarily was experimental and it might well turn out, as it did in the case of Dugan, that some of the personnel, although able, would not fit into the picture as it had been hoped they would. In this situation it would not be to the interest of the corporation to tie itself up to term contracts with all of these optionees, and it was definitely to the interest of the corporation to give them some incentive, which at the time the plan was proposed presented no immediate substantial market advantage. In view of the trial court's unchallenged finding that there was no waste, the appellant's comments on this subject can have no substance.

The fact of the matter is that the entire option plan turned out to be of the utmost benefit to Thatcher and no one of Thatcher's numerous stockholders has complained of it, except the plaintiff, and he at the time complained only of the $10 option to Pollock which was cancelled.

The following language from the second *Holthusen* opinion is here most appropriate (53 Fed. Supp. 488, 490):

> "The burden is on a minority stockholder of a corporation who seeks to have the courts intervene in corporate management and restrain action approved by the board of directors, to establish that

such action transcends the point where the will of the majority may properly be imposed on the minority. Unless this be so, the floodgates would be opened to a surge of litigation by which the courts would be called upon to review the action of corporate directors with respect to all contracts of employment and an unlimited number of other matters."

5, 6 and 7. As to the petitioner's contention that there have here been decided important questions in the field of corporate law and trusts in conflict with fundamental law.

The petitioner's reasons numbered 5, 6 and 7 cover substantially the same ground and the general import is as above stated (Br. p. 5).

Number 5 purports to have to do with the question as to whether the directors may grant stock options to "insiders" at one-half of the market price because of alleged commitments made before the advance of the market price.

This, of course, merely restates the problem which faced the directors of Thatcher, which was simply whether to disrupt the morale of the new administration by refusing to carry out promises made simply because of mechanical difficulties encountered in their consummation. As to this the Circuit Court of Appeals properly said (p. 693):

> "Whether to disappoint the just expectations of those on whom the corporation needed to rely during its upbuilding was a business problem for the directors to solve."

Number 6 is simply a rephrasing of number 5 with an emphasis on the options to Dugan, as to whom petitioner states "no commitment was made." This statement as to Dugan flies directly in the face of the uncontradicted

testimony in the case to which we have referred above (p. 5).

Number 7 makes the gratuitous statement that the Circuit Court of Appeals "has decided important questions in the field of corporate law and trusts in conflict with fundamental law and the questions are of great public interest."

There was nothing in the decision of the Circuit Court of Appeals or of the trial court which departed from the long settled principles enunciated in *Pollitz* v. *Wabash R.R. Co.,* 207 N. Y. 113, 124 (*supra,* p. 13), where the court said that questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest and unselfish decision of the directors.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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